## INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 2 |
| Questions presented | 2 |
| Statute involved | 2 |
| Statement | 3 |
| A. The prior unfair labor practice proceeding | 3 |
| B. The backpay proceeding | 5 |
| Argument | 7 |
| Conclusion | 13 |


## CITATIONS

Cases:


| | |
|---|---|
| *Cooper Thermometer Co.* v. *National Labor Relations Board*, 376 F. 2d 684 | 9, 10 |
| *Ex-Cell-O Corp.*, 183 NLRB No. 20, 74 LRRM 1740 | 9 |
| *Int'l Union of Mine, Mill & Smelter Workers* v. *Eagle-Picher Mining Co.*, 325 U.S. 335 | 12 |
| *Isis Plumbing & Heating*, 138 NLRB 716 | 13 |
| *Local 138, Int'l Union of Operating Engineers (Nassau & Suffolk Contractors Assoc.)*, 151 NLRB 972, enforced, 380 F. 2d 244 | 12 |
| *Lozano Enterprises*, 152 NLRB 258, enforced, 356 F. 2d 483 | 12 |
| *National Labor Relations Board* v. *American Compress Warehouse*, 374 F. 2d 573 | 12 |

| Cases—Continued | Page |
|---|---|
| *National Labor Relations Board* v. *Brown & Root, Inc.*, 311 F. 2d 447 | 8 |
| *National Labor Relations Board* v. *Lambert*, 211 F. 2d 91 | 11 |
| *National Labor Relations Board* v. *Louisiana Industries, Inc.*, 414 F. 2d 227, certiorari denied, 396 U.S. 1039 | 11 |
| *National Labor Relations Board* v. *Mastro Plastics Corp.*, 261 F. 2d 147 | 11 |
| *National Labor Relations Board* v. *Rice Lake Creamery Co.*, 365 F. 2d 888 | 8 |
| *National Labor Relations Board* v. *Toppino & Sons, Inc., Charley*, 358 F. 2d 94 | 8 |
| *Palmer* v. *Connecticut Rway. & Lighting Co.*, 311 U.S. 544 | 8 |
| *Porter, H. K.* v. *National Labor Relations Board*, 397 U.S. 99 | 9 |
| *United States* v. *Tucker Truck Lines, Inc.*, 344 U.S. 33 | 11 |
| Statute: | |
| National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*): | |
| Section 8(a)(1) | 3 |
| Section 8(a)(3) | 3 |
| Section 8(a)(5) | 3, 4 |

# In the Supreme Court of the United States

OCTOBER TERM, 1970

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No. 1569

FIBREBOARD CORPORATION, PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD AND UNITED STEELWORKERS OF AMERICA, AFL-CIO

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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### OPINIONS BELOW

This Court's prior opinion sustaining the Board's unfair labor practice findings and enforcing its order is reported at 379 U.S. 203. The opinion of the court of appeals enforcing the Board's supplemental backpay order (Pet. App. 1-3) is reported at 436 F. 2d 908. The Board's supplemental backpay decision (App. 1-42; A. 57-100)[1] is reported at 180 NLRB

[1] "A." refers to the bound appendix to the briefs in the court below. "App." refers to the separate document captioned Appendix to the Petition and "Pet. App." to the Appendix contained in the Petition.

No. 33; its earlier decision is reported at 130 NLRB 1558 and 138 NLRB 550.

## JURISDICTION

The judgment of the court of appeals was entered on January 11, 1971, and a petition for rehearing was denied on January 18, 1971 (App. 43-45). The petition for a writ of certiorari was filed on April 10, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether, on the facts of this case, the formula by which the Board computed the company's backpay obligation was a reasonable means of approximating what the employees would have earned in the absence of the company's unfair labor practice.

2. Whether the Board abused its discretion in refusing to consider, in supplemental backpay proceedings, a misconduct defense to reinstatement which could have been, but was not, raised in the initial unfair labor practice proceeding.

3. Whether the Board properly increased the company's backpay liability to reflect interest, even though its original order did not expressly provide for interest.

## STATUTE INVOLVED

The relevant provision of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), is set out at Pet. App. 6-7.

## STATEMENT

### A. The Prior Unfair Labor Practice Proceeding

On July 27 and 30, 1959, just before the expiration of a collective bargaining contract, the Company informed the Union [2]—which had been the exclusive bargaining representative of a unit of 50 maintenance machinists at the Company's plant for 22 years—that it had decided, for economic reasons, to contract out maintenance work. When the contract expired on July 31, the Company terminated its maintenance machinists and an outside contractor took over their duties. The former employees began to picket the plant. 130 NLRB at 1559, 1562, 1567-1571. On August 3, the Company secured a state court injunction against picket line misconduct, and later successfully prosecuted state court contempt charges against three former employees for engaging in such misconduct (App. 12; A. 661, 668).

The Union filed charges with the Board on July 31, 1959 alleging that the Company violated Sections 8(a)(1), (3), and (5) of the Act by contracting out the work without first bargaining with the Union.[3] On September 13, 1962 the Board, reversing its earlier dismissal of the charges (130 NLRB 1558), held that

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[2] Local 1304, United Steelworkers of America.

[3] The unfair labor practice hearing on these charges was held on September 21 and 22, 1959—only two weeks before the state court issued its findings of fact and conclusions of law in the contempt proceedings (App. 12; A. 30, 79; 183, 668). The Company's brief to the Trial Examiner, although submitted long after the state court findings issued, did not mention them (App. 13, n. 39).

the Company had violated its duty to bargain under Section 8(a)(5) of the Act by unilaterally subcontracting its unit work. 138 NLRB 550. The Board ordered the Company to offer the terminated machinists reinstatement and backpay in an amount "based upon the earnings which they normally would receive from the date of this Supplemental Decision * * * to the date of [the Company's] offer of reinstatement." *Id.* at 555 & n. 21.

The court of appeals affirmed the Board's unfair labor practice finding and enforced its order. *Fibreboard Paper Products Corp.* v. *National Labor Relations Board*, 322 F. 2d 411 (C.A.D.C.). This Court also affirmed. 379 U.S. 203. It rejected the Company's contention that the Board's order was beyond its authority since there was no certainty that the Company, had it bargained with the Union, would have retained the former employees. The Court noted the Board's "broad discretionary" power in "devising remedies to effectuate the policies of the Act" and held that there "has been no showing that the Board's order restoring the *status quo ante* * * * is not well designed to promote [those policies] * * * [or] would * * * impose an undue or unfair burden on the Company." *Id.* at 215-217. On January 18, 1965 the Company offered reinstatement to a substantial number of the terminated machinists in accord with the Board's order, thereby fixing the date of its liability for back pay (A. 583; G.C. Exh. 1(k), pp. 1-2).[4]

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[4] The relevant back pay period therefore runs from September 14, 1962, the date of the Board's second decision, to January 18, 1965 (App. 2, n. 2; 138 NLRB at 555, n. 21).

### B. The Backpay Proceeding

In the supplemental proceeding to determine the company's back pay obligation, the Board adopted the "Pabco Wage Formula" as a means of approximating what the unlawfully terminated employees would have earned. The Board found that from 1937 to 1959 the Company's maintenance work had been performed by a discrete unit of Union machinists plus "a few" millwrights who were represented by another union, the ILWU (App. 3 n. 3; 130 NLRB at 1559). The collective bargaining agreements in effect since August, 1951 provided that the machinists' wages would be computed by the Pabco formula. According to this formula, machinists were to be paid 12.5 cents per hour less than the prevailing building and construction crafts scale. (App. 2-3; A. 548-549, 634, 695). During the same period, the ILWU millwrights automatically received the same pay as the machinists; their wages were not independently negotiated. (App. 3; A. 129, 552).

After the Company unlawfully terminated its Union machinists, ILWU millwrights retained two of the 21 available unit jobs. The millwrights did not bargain for or receive any wage increase until 1961, when they were given the wage rates received by the Company's production workers (App. 3-4; A. 14-19, 66-70 & nn. 13-14; 293, 301-304, 552-562).[5] The other

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[5] The Company's production workers, who were represented by the ILWU, consistently received lower hourly wages than did the machinists. Thus the production workers scale between September, 1962 and June 1965 increased from $3.695 to $3.985 (App. 4, n. 5; 37-39, n. 28; 31; A. 129, 133, 557-

19 unit jobs were taken over by the outside contractor's employees, who were paid the prevailing building and construction crafts scale throughout the period, or 12.5 cents per hour more than the terminated Union machinists would have received under the Pabco formula (App. 3-4, n. 6; A. 66-70, 108-109, 121-128, 278-288, 295-298, 333-336, 496-497, 569-581). When the Union machinists accepted the offer of reinstatement and returned to work in March 1965, they received an interim wage rate pending negotiations. In July, they accepted a collective bargaining contract which provided a $4.00 hourly wage—80 cents per hour less than the Pabco formula would have yielded. (App. 8; A. 469-479.)

The Board concluded on these facts that the Pabco wage formula, in effect for the eight years preceding the machinists' discharge, "provided the most reasonable, acceptable, and objective approximation of what the backpay claimants would have received" but for their unlawful termination (App. 11; A. 58-60, 65).[6]

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562). The prevailing scale in the building and construction crafts increased from $4.40 to $4.925 during the same period. Under the Pabco formula, therefore, the machinists would have received $4.275 between September 14, 1962 and July 31, 1963; and $4.505 between August 1, 1963 and January 18, 1965, when the offer of reinstatement was made (App. 4 A n. 6; 27, n. 9; A. 130).

[6] The Board reversed its Examiner who had held that the wages paid the two ILWU millwrights during the backpay period provided the proper basis for approximating backpay. The Board found that the Examiner's holding was premised on the erroneous assumption that the January 1965 hourly rate of the independent contractor's employees was the same as the ILWU millwrights, instead of 63 cents higher (App. 5-7; 35, n. 23; A. 129-130, 133, 559-562).

The Board therefore ordered the Company to pay the discharged machinists what they would have received under the Pabco formula during the backpay period (App. 11, 19-20).[7]

The Board refused to consider the Company's newly-raised defense that three of the employees should be denied back pay because of picket line misconduct occurring in August 1959. It held that the defense was untimely because the Company had full knowledge of the facts prior to the original unfair labor practice hearing and could have raised it and had it determined with finality in that proceeding (App. 12-18). The Board also ordered the Company to pay interest on its backpay obligation, even though its original unfair labor practice order did not include an interest requirement (App. 39-40).

The court of appeals (District Judge Matthews dissenting) sustained the Board's findings and enforced its backpay order (Pet. App. 2-3).

## ARGUMENT

1. Petitioner's primary contention is that the Board exceeded its remedial authority under the Act by imposing on it a contract term to which it would not have voluntarily agreed (Pet. 10-15). The Board, however, decided only the amount of back pay which was due employees who had been unlawfully discharged. The measure of back pay is a conventional

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[7] More specifically, the Board ordered the Company to pay a total of $330,931.95 to 36 employees (App. 19-20).

factual issue with which the Board frequently deals [8] and which does not warrant review by this Court. The record, moreover, supports the Board's conclusion that the Pabco formula, rather than the rates paid during the back pay period to the Company's few ILWU millwrights or some other standard, provided the most reasonable basis for estimating the wages machinists would have received but for their unlawful termination.[9]

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[8] *E.g., National Labor Relations Board* v. *Rice Lake Creamery Co.*, 365 F. 2d 888, 891 (C.A. D.C.); *National Labor Relations Board* v. *Charley Toppino & Sons, Inc.*, 358 F. 2d 94, 97 (C.A. 5); *National Labor Relations Board* v. *Brown & Root, Inc.*, 311 F. 2d 447, 452 (C.A. 8). See *Palmer* v. *Connecticut Rway. & Lighting Co.*, 311 U.S. 544, 561.

[9] The Board rejected use of the wage rate paid ILWU millwrights essentially because they had never bargained independently (always receiving the rate paid machinists) and did not bargain after the machinists were terminated, possibly because of that termination (App. 7-8). It considered the Pabco formula more accurate than prevailing rates paid other machinists in the area because the Company had consistently paid a higher wage, based on the Pabco formula, than other area employers (App. 7, n. 10; A. 481, 635, 737).

The Board also stressed the fact that the employees of the outside contractor who replaced the machinists were paid 12.5 cents an hour more than the machinists would have received under the Pabco formula (App. 6; A. 130, 569-581). It minimized the significance of the wage rate agreed upon by the parties after this Court's decision, which was 80 cents less than the Pabco rate and approximately the same as the rate paid ILWU production workers. The Board concluded that the posture of negotiations leading to this agreement—pitting a union, seriously weakened by being off the job for six years, against a company "determined to preserve the savings it had achieved through its unlawful" conduct (App. 8; A. 471-472, 549-550)—prevented this figure from being an accurate estimate of the rate which would have been agreed upon in earlier bargaining (App. 9).

This is not a case like *H. K. Porter* v. *National Labor Relations Board*, 397 U.S. 99, where the Board sought to remedy the employer's unlawful refusal to bargain by requiring him to accede to a term in the collective bargaining agreement which was the subject of attempted negotiation and which he had refused to discuss. The fundamental controversy here —whether the Company had committed an unfair labor practice by contracting out its maintenance work without first bargaining with the Union—was settled adversely to petitioner by this Court's earlier decision. The remedy for its unlawful refusal to bargain included reinstatement and back pay pending bargaining with respect to contracting out the maintenance work. The only remaining question was the amount of back pay. To effectuate its order, it was necessary for the Board to impose some standard for determining back pay, and it chose, reasonably, to adopt the formula which the Company and Union had employed for the past eight years.[10]

Nor does the decision below conflict with *Cooper Thermometer Co.* v. *National Labor Relations Board*, 376 F. 2d 684 (C.A. 2) (Pet. 13-14). The facts in

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[10] Similarly, *Ex-Cell-O Corp.*, 185 NLRB No. 20, 74 LRRM 1740, is inapposite. The Board there held that it lacked power, as a remedy for the employer's illegal refusal to recognize and bargain with the union, to compensate the employees for the value of the union representation which they were unlawfully denied. In the Board's view, such a remedy would, like the one invalidated in *Porter*, compel the Board to write a contract for the parties. For, "there is no basis for such a remedy unless the Board finds, as a matter of fact, that a contract would have resulted from bargaining." 74 LRRM at 1743. Here, as noted, the contract formula had existed for many years.

that case were very different and were more complex than those present here. The Company in *Cooper Thermometer* decided, for economic reasons, to relocate its plant. The Board held that the Company had committed an unfair labor practice by refusing to bargain with the Union regarding conditions of transfer to the new plant. It ordered the Company to offer employees of the old plant reinstatement to equivalent positions at the new plant without loss of seniority and ordered back pay, for those who transferred, based on the wage rates under the contract at the old plant. The court upheld the Board's ruling that the company had committed an unfair labor practice and agreed that reinstatement and back pay were appropriate. But it refused to enforce the Board's "little illumined" order (376 F.2d at 685) regarding the conditions of reinstatement or the rate for back pay, concluding that these provided a less accurate approximation of what agreement would have been reached than would current good faith bargaining regarding these matters. The court stressed the difficulty of determining, in light of additional factors such as the distance of the new plant, which employees would have transferred. It stated that back pay on the basis of the old contract terms would "hopelessly complicate" that determination by providing a powerful incentive to transfer. 376 F. 2d 691. Under the simpler facts of this case, there are no such problems concerning the Board's decision, which was a carefully considered and reasonable estimate of the wage rate which would have been adopted as a result of earlier bargaining. Indeed, the court in *Cooper Thermometer*

itself noted that the greater complexity of that case "sufficiently distinguishes the decisions enforcing back pay orders for failure to bargain over subcontracting" (*ibid.*).

2. The Company further argues (Pet. 15-19) that the Board abused its remedial power by refusing to consider the Company's defense, first raised in the supplemental proceeding, that three terminated machinists should be denied reinstatement and back pay because of picket line misconduct which antedated the original unfair labor practice hearing. This issue was also correctly decided below and does not warrant review by the Court. The Board has frequently, and properly, exercised its discretion to require an employer to raise such a defense in the initial proceeding in circumstances, such as these, where the Company had knowledge of the underlying facts and was on notice that reinstatement and back pay were in issue. *National Labor Relations Board* v. *Mastro Plastics Corp.*, 261 F. 2d 147, 148 (C.A. 2); *National Labor Relations Board* v. *Lambert*, 211 F. 2d 91, 94 (C.A. 5). See also *National Labor Relations Board* v. *Louisiana Industries, Inc.*, 414 F. 2d 227, 228 (C.A. 5), certiorari denied, 396 U.S. 1039; *United States* v. *Tucker Truck Lines, Inc.*, 344 U.S. 33, 36-37.[11]

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[11] The cases the Company cites (Pet. 17-19) do not support its assertion that the Board has consistently permitted misconduct defenses to be raised for the first time in supplementary proceedings. Those cases involved either no objection to the untimely raising of the defense at the back pay stage (cf. A. 80, n. 44), or timely raising of the defense in the unfair labor practice proceeding and the Board's election, in its sound discretion, to defer it.

3. There is, finally, no merit to the Company's argument that the Board lacked power to assess reasonable interest on the backpay award because its original remedial order did not expressly provide for interest (Pet. 19-22). The Board has discretion, in supplemental proceedings, to assess interest on a backpay obligation despite the silence of its original order or of the court decree enforcing it. See *Local 138, Int'l Union of Operating Engineers (Nassau & Suffolk Contractors' Assoc.)*, 151 NLRB 972, 974, enforced in this respect, 380 F. 2d 244, 254 (C.A. 2); *Lozano Enterprises*, 152 NLRB 258, 260, n. 8, enforced, 356 F. 2d 483 (C.A. 9); *National Labor Relations Board* v. *American Compress Warehouse*, 374 F. 2d 573, 575 (C.A. 5). As the Fifth Circuit stated in *American Compress, supra:* "The supplemental orders may not 'enlarge upon' or be 'inconsistent with' the terms of the Court's enforcement decree. The interest award does neither, for it simply conforms to the Board's original order that the employer make the discharged employees whole for any loss of pay suffered by reason of the discrimination against them." [12] The assessment of interest was not unreasonable here. The Company was aware of the Board's new policy respecting interest for virtually the entire backpay pe-

[12] The interest award here does not conflict with this Court's decision in *Int'l Union of Mine, Mill & Smelter Workers* v. *Eagle-Picher Mining Co.*, 325 U.S. 335, which merely held that the Board could not enlarge its backpay formula for determining the employer's basic liability after it had been enforced by the court and the employer had attempted to comply. No compliance effort was made here, nor was the Company's basic liability changed.

riod and could have terminated its liability at any time by offering the claimants suitable reinstatement.[13]

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1971.

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[13] The Board's decision announcing the assessment of interest on all future backpay obligations issued September 19, 1962. *Isis Plumbing & Heating*, 138 NLRB 716. The decision finding the Company's unilateral action an unfair labor practice and directing reinstatement and back pay issued September 13, 1962, effective the next day. 138 NLRB 550, 554-557. The Company thus was on notice of its possible liability for interest five days after the backpay period began to run.

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